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# Is leave of court required for proceedings against a liquidator?

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## Introduction

When a company is wound up by the court, the court will appoint a liquidator to manage the affairs of the company, including realising the assets and paying the resulting proceeds to the unsecured creditors. In essence, the liquidator represents and safeguards the interests of the general body of unsecured creditors. Therefore, it is crucial for the liquidator to focus on their duties without any interference from other parties, including vexatious and frivolous proceedings. Regarding proceedings against a liquidator, there were previously two conflicting judicial decisions<sup>(1)</sup> on whether prior leave of court is required before commencing proceedings against a court-appointed liquidator. The Federal Court's decision in *N Chanthiran a/l Nagappan v Kao Che Jen*<sup>(2)</sup> has put this issue to rest.

## Facts

At the Federal Court, the respondent was a contributory and director of a company that had been wound up by the High Court pursuant to a winding up petition. The winding-up court had appointed the appellant as the liquidator to manage the affairs of the company. Since then, the respondent had initiated a series of proceedings against the appellant in the capacity of liquidator of the company seeking, among other things, to remove the liquidator and to compel him to produce the documents and accounts of the company.

When these proceedings proved unsuccessful, the appellant commenced another action before the other High Court without first obtaining any leave of Court. This action led to the appeal before the Federal Court. To appreciate the significance of the ruling of the Federal Court, it is important to understand the position at the High Court and Court of Appeal before the issue came for determination before the Federal Court.

## High Court

Alleging that the liquidator failed to perform his duties, the contributory applied to and sought an order from the High Court to compel the liquidator to perform various actions. The liquidator then raised a preliminary objection on the basis that the contributory had failed to obtain leave of the winding-up court to commence the action. In response, the contributory argued that this leave was not required as the action was grounded on the failure of the liquidator to discharge his duties as liquidator and was not against the liquidator in his personal capacity.

Referring to and relying on the decision of the Court of Appeal in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow*,<sup>(3)</sup> the High Court allowed the liquidator's preliminary objection and held that leave of court was required before an action could be initiated against a court-appointed liquidator who is an officer of the court.

The legal provision referred to in *Chi Liung* was section 236(3) of the Companies Act 1965, which is *pari materia* with section 486(2) of the Companies Act 2016:

*486 Powers of liquidator in winding up by Court*

...

*(2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is **subject to the control of the Court** and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (Emphasis added.)*

## Court of Appeal

The contributory appealed against the decision of the High Court. The appeal before the Court of Appeal was centred on the issue of whether leave of the winding-up court was required, under section 486(2) of the Companies Act 2016, to commence proceedings against the liquidator.

Citing a previous decision delivered by the Court of Appeal in *Kao Che Jen v N Chanthiran a/l Nagappan*,<sup>(4)</sup> the Court of Appeal, in the present appeal, held that leave of court is not required. The Court decided this as section 486(2) of the Companies Act 2016 does not stipulate that leave is required before any creditor or contributory may apply to the court regarding the exercise of powers conferred on the liquidator by section 486(2). The reasoning was that the court's function is limited to giving effect to every word in a statute and not reading words into a statute.

## Federal Court

The sole issue before the Federal Court was whether leave of court is required before commencing proceedings against a liquidator appointed by the court in a compulsory winding up. Having considered the origins of the office of a liquidator and analysing the judicial decisions relating to the subject matter and statutory provisions under the company law regime, the Court held that leave of court is required to commence proceedings against the liquidator by virtue of the phrase "subject to the control of the Court".

The phrase essentially means that the liquidator is answerable to the court in the performance of their duties and is obliged to conduct the winding-up process in accordance with the order granted by the winding-up court, which has supervision over the winding up. Therefore, unless permission from the winding-up court is obtained, no one is permitted to interfere with the performance of the liquidator's duties. It would be an abuse of process if proceedings could be commenced in other courts notwithstanding the supervision by the winding-up court.

In interpreting the relevant provisions in the Companies Act, the Court adopted the purposive approach under the Interpretation Acts 1948 section 17A. The Court held that the Court of Appeal had erred in interpreting the provisions in a manner which is "purely textual", "strictly grammatical" or "overly simplistic".

In arriving at this decision, the Federal Court also considered its decision in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors*<sup>(5)</sup> which clarified the test for granting leave to commence proceedings against a liquidator. The test is that a prospective litigant must demonstrate a prima facie case to obtain leave successfully. Justice Nallini noted that the pronouncement by the Federal Court in *Ooi Woon Chee* established the legal principle that leave of the winding up court is required before proceedings can be commenced against a court-appointed liquidator.

More significantly, the Federal Court was disturbed by the Court of Appeal's contravention of the more vital doctrine of stare decisis by not following the pronouncement in *Ooi Woon Chee*. The Court described the failure as a "fundamental error of law".

#### Comment

In this case, the Federal Court reaffirmed the fundamental principle of stare decisis in the administration of justice. It discouraged courts from departing from higher authorities that are supposed to be binding on them.

Substantively, this decision made it clear that leave of the winding up court is required to commence legal proceedings against a court-appointed liquidator. It leaves no room for parties to escape the ruling by attempting to draw an artificial distinction between suing the liquidator in an official capacity and personal capacity.

For further information on this topic please contact [Lee Xin Div](mailto:xindiv@ganlaw.my) at Gan Partnership by telephone (+603 7931 7060) or email ([xindiv@ganlaw.my](mailto:xindiv@ganlaw.my)). The Gan Partnership website can be accessed at [www.ganlaw.my](http://www.ganlaw.my).

#### Endnotes

(1) The following cases have established the position that leave of court is required to commence proceedings against a liquidator:

- *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204;
- *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors* [2009] 3 MLJ 191; and
- *KTM Transformers Sdn Bhd v N Chanthiran a/l Nagappan* [2015] 5 MLJ 547; [2015] 1 LNS 530.

However, the Court of Appeal has departed from this well-settled position in recent cases, including *Kao Che Jen v N Chanthiran a/l Nagappan* [2015] MLJU 2236.

(2) *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284.

(3) *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204.

(4) *Kao Che Jen v N Chanthiran a/l Nagappan* [2015] MLJU 2236.

(5) *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713.